In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-549

BELL SUPERVISORS PROTECTIVE ASSOCIATION (Not a Labor Organization), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. Pursuant to a charge filed by petitioner Bell Supervisors Protective Association ("the Association"), the Board found that the International Brotherhood of Electrical Workers, AFL-CIO, and its affiliated Local 134, violated Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), by disciplining foremen-members for performing the work of rank-and-file employees during an economic strike at Illinois Bell Telephone Co. (Pet. App. 30a-33a). The Board, however, refused to amend the complaint to allow the Association to challenge the legality of the union security clause of the collective bargaining contract between the Company and Local 134 (Pet. App. 28a, 20a).

The Association sought review in the United States Court of Appeals for the Seventh Circuit of the Board's refusal to amend the complaint. The Unions, meanwhile,

petitioned the United States Court of Appeals for the District of Columbia Circuit to review the unfair labor practice finding against them. Thereafter, the Seventh Circuit case was transferred to the District of Columbia Circuit, and the two cases were consolidated "for all purposes" (Pet. App. 1a); the Unions' case was numbered 71-1559, and the Association's, 71-1785.

On September 22, 1972, a panel of the District of Columbia Circuit sustained the Board's unfair labor practice finding against the Unions and also its refusal to amend the complaint (Pet. App. 60a-70a, 70a-74a). Pursuant to the Unions' petition, however, the full court withdrew the panel decision, and ordered that No. 71-1559 be reheard *en banc* together with *International Brotherhood of Electrical Workers, Local 642, et al.* v. *National Labor Relations Board, and Florida Power & Light Company,* No. 71-1712, which presented the same issue. On June 29, 1973, the full court, by a 5-4 vote, rejected the Board's unfair labor practice findings in Nos. 71-1559 and 71-1712 (Pet. App. 96a-143a).[1] On the same date, the panel which issued the September 22 decision vacated the consolidation of Nos. 71-1559 and 71-1785,[2] and entered a separate order in No. 71-1785, affirming the Board's refusal to amend the complaint for the reasons set forth in its earlier opinion (Pet. App. 2a).

2. The first question which the Association seeks to present—whether a union may lawfully discipline foremen-

---

[1] The Board intends to file a petition for a writ of certiorari to review the adverse *en banc* decision in both Nos. 71-1559 and 71-1785. Florida Power & Light Company has already filed a petition to review that decision in 71-1785. *Florida Power & Light Company* v. *International Brotherhood of Electrical Workers, Local 642, et al.*, No. 73-556.

[2] A copy of this order is set forth in the Appendix, *infra*, p. .

members for refusing to perform rank-and-file work during a strike—is the same question which the Board intends to present in its petition, and which is also the subject of the petition filed by *Florida Power & Light Company*, No. 73-556 (n. 1, *supra*). Accordingly the Board does not oppose the Association's petition, limited to the first question. We point out, however, that the Association may not have standing to raise that question. In the court of appeals, the Association did not intervene in the Unions' review proceeding, No. 71-1559, and the mere fact that its proceeding, No. 71-1785, was originally consolidated with No. 71-1559 would ordinarily not be sufficient to make the association a party in No. 71-1559. 5 *Moore's Federal Practice* (2d ed. 1971), par. 42.02.

3. The Association's second question—whether the Board properly refused to amend the complaint—does not warrant further review. On the facts of this case, the Board's action was reasonable and in accord with settled principles.

a. In May 1968, the Association filed with the Board's Regional Office an unfair labor practice charge alleging that the union security clause of Illinois Bell's collective bargaining agreement with Local 134 was unlawful because the unit which it covered included both supervisors and non-supervisors (A. 201).[3] The Regional Director refused to issue a complaint on this charge and his refusal was upheld by the General Counsel on appeal (A. 202).[4] Thereafter, in June 1969, the Association

---

[3] "A." refers to the appendix to the briefs in the court below.

[4] The General Counsel concluded: "The inclusion of alleged supervisors in the unit by voluntary agreement of the contracting parties did not, standing alone, constitute an unfair labor practice, nor did it render such unit inappropriate for coverage by an otherwise valid union security clause" (Pet. App. 46a, n. 8).

initiated the instant case; neither its charge nor the subsequent complaint issued by the Regional Director referred to any alleged illegality of the union security clause. On the afternoon of the final day of the four-day unfair labor practice hearing, however, the Association sought to amend the complaint to add this new allegation (A. 184-185, 147-150). Counsel for the General Counsel did not join or consent to the Association's motion to amend the complaint. The Board upheld the Trial Examiner's refusal to amend the complaint (Pet. App. 20a-21a, 28a), and the court of appeals found that the Board had not abused its discretion (Pet. App. 70a-74a).

b. Under Section 3(d) of the Act, 29 U.S.C. 153(d), the General Counsel of the Board "has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. 171, 182. Accordingly, an amendment of the complaint in a Board proceeding is ordinarily barred, unless the General Counsel consents. See, *e.g.*, *National Maritime Union of America, AFL-CIO* v. *National Labor Relations Board*, 423 F. 2d 625, 626 (C.A. 2); *United Steelworkers, etc.* v. *National Labor Relations Board*, 393 F. 2d 661, 664 (C.A. D.C.); *National Labor Relations Board* v. *Raytheon Co.*, 445 F. 2d 272, 274 (C.A. 9).[5]

[5] *National Labor Relations Board* v. *Sterling Furniture Co.*, 202 F. 2d 41 (C.A. 9), and *Frito Co.* v. *National Labor Relations Board*, 330 F. 2d 458 (C.A. 9), relied upon by the Association (Pet. 10), are inapposite. In *Sterling*, 202 F. 2d at 43-44, the General Counsel expressly joined in the proposed amendments. Contrary to the Association's suggestion (Pet. 4), counsel for the General Counsel did not consent to the amendment here (Pet. App. 46a; A. 147-150). Similarly, in *Frito*, the General Counsel permitted the introduction of evidence raising the issue in question without objection, thereby constructively consenting, the court held (330 F. 2d at 465), to the proposed amendment. Here the Examiner found that the issue sought to be raised had not been litigated in the proceeding (A. 149). Moreover, of course, only one of the two parties to the collective bargaining agreement was a party in the unfair labor practice proceedings.

The petition for a writ of certiorari should be denied with respect to question 2. We do not oppose the petition with respect to question 1.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

NOVEMBER 1973.

APPENDIX

SEPTEMBER TERM, 1972

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 71-1785

BELL SUPERVISORS PROTECTIVE ASSOCIATION (NOT A LABOR ORGANIZATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

BEFORE: Wright and MacKinnon, Circuit Judges; and *Matthews, United States Senior District Judge for the District of Columbia.

ORDER

IT IS ORDERED, *sua sponte,* that the consolidation of the above entitled cases is hereby vacated.

Per Curiam

Filed June 29, 1973

HUGH E. KLINE,
Clerk.

• Sitting by designation pursuant to Title 28 U.S.C. §294(c).